OAH 65-3300-30200

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Adopted Rules of the Board of Water and Soil Resources Governing Erosion Control and Water Management and the Reinvest in Minnesota Reserve Programs, Minn. R. 8400.0050 to 8400.3930

ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26

This matter came before Administrative Law Judge Ann O'Reilly upon the application of the Minnesota Board of Water and Soil Resources ("Board") for a legal review of rules under Minn. Stat. § 14.26.

On November 30, 2012, the Board filed documents seeking review and approval of its rules governing erosion control and water management and the Reinvest in Minnesota Reserve Program (Minn. R. 8400.0050 to 8400.3930) pursuant to Minn. Stat. § 14.26 and Minn. R. 1400.2310.

Based upon a review of the written submissions and filings made on November 30, 2012, and for the reasons set forth in the attached memorandum,

IT IS HEREBY ORDERED THAT:

1. The Board has statutory authority to adopt the rules.

2. By failing to amend and republish the Notice of Intent to Adopt Rules to include a later date for submission of comments, the Notice was technically deficient. Such procedural error was, however, corrected by the Board, and did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. Accordingly, the procedural defect was harmless and does not impact the approval of the rules.

3. By failing to notify all persons and entities who requested a hearing of their right to provide additional comment within five (5) working days in the Notice of Withdrawal, the Board did not comply with Minn. Stat. § 14.25, subd. 2. Such defect can be corrected if the Board, within the 30-day resubmission period, notifies all persons and entities who requested a hearing of their right to provide additional comment relating to the withdrawal within five (5) working days.

4. The rules contain several substantive defects which render the rules adoption **NOT** in compliance with Minnesota Statutes Chapter 14 and Minnesota Rules Part 1400. Those defects are described in the Memorandum below.

Dated: December 14, 2012

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ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the Board has submitted these rules to the Administrative Law Judge for review as to legality. Minnesota Rules Part 1400.2100 identifies several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include:

(1) The rule was not adopted in compliance with the procedural requirements of Minn. Stat. Chap. 14 or other law or rule, unless the judge decides that the error was harmless and should be disregarded;
(2) The rule is not rationally related to the agency's objective or the record does not demonstrate need for or reasonableness of the rule;
(3) The rule is substantially different from the proposed rule and the agency did not follow the procedures of Minn. R. 1400.2110;
(4) The rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;
(5) The rule is unconstitutional or illegal;
(6) The rule improperly delegates the agency's powers to another agency, person or group;
(7) The rule is not a "rule" as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or
(8) The rule is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing request have been withdrawn and written responses to it show that the withdrawal is not consistent with Minn. Stat. § 14.001, clauses (2), (4) and (5).[1]

The rules presented herein for review contain two procedural defects and several substantive defects which render those rules not in compliance with Minn. Stat. Chap. 14 and Minn. R. 1400.2000-2410. Each of the defects is addressed in detail below.

[1] Minn. R. 1400.2100.

I. PROCEDURAL DEFECTS

A. Defect in Notice of Intent to Adopt Rules

The Notice of Intent to Adopt Rules Without a Public Hearing ("Notice") was published in the *State Register* on May 7, 2012, and provided that the comment period would end at 4:30 p.m. on June 6, 2012, exactly 30 days from the date of publication.[2] The same Notice was also mailed electronically to all persons and associations on the Board's rulemaking mailing list on both May 4, 2012, and May 8, 2012.[3] It is unclear in the record why the email was sent on two separate dates.

The mailing on May 4, 2012, was exactly 33 days prior to the published end of the comment period (June 6, 2012), as required by Minn. R. 1400.2085, subd. 4. However, the mailing on May 8, 2012, was just 29 days prior to the published end of the comment period. There was no additional published notice.

To remedy the defect for the second email notice, the Board extended the period it was willing to receive comments to June 11, 2012. According to the Statement of Need and Reasonableness ("SONAR"), the "Notice was later amended to extend the comment period through June 11, 2012." There is nothing in the record to indicate that the Notice was republished or an amended Notice sent. It appears that the same notice was sent on May 4 and May 8, 2012. However, the email sent on May 8, 2012, with the Notice, states that "[t]he comment period will be open for 35 days, or until Monday, June 11, 2012."[4] To the extent that the May 8, 2012 Notice was dispatched 29 days before the close of the comment period, as published in the *State Register*, this late mailing is a procedural defect.

Pursuant to Minn. Stat. § 14.26, subd. 3(d), the Administrative Law Judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirements imposed by law or rule if the Administrative Law Judge finds:

(1) That the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or

(2) The agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

Here, the group of individuals and entities on the Board's rulemaking list that received notice on May 8, 2012, had 35 days in which to comment on the rule. This group was advised of the extended comment period via the email. Therefore, the Board took sufficient corrective action to cure the defect so that the defect did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

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[2] *See* Ex. E, Notice of Intent to Adopt Rules as published in the *State Register* on May 7, 2012.
[3] *See* Ex. G, Certificate of Accuracy of the Mailing List and Certificate of Mailing the Notice of Intent to Adopt Rules Without a Public Hearing to the Rulemaking Mailing List.
[4] Ex. E.

Accordingly, the procedural defect was harmless and does not affect the legality of the proposed rules.

B. Defect in Notice of Withdrawal

Minnesota Statutes Section 14.25, subd. 2 provides:

> If a request for a public hearing has been withdrawn so as to reduce the number of requests below 25, the agency must give written notice of that fact to all persons who have requested the public hearing….The notice must explain why the request is being withdrawn, and must include a description of any action the agency has taken or will take that affected or may have affected the decision to withdraw the requests. The notice must also invite persons to submit written comments within five working days to the agency relating to the withdrawal….

In this case, the Board received 41 requests for public hearing.[5] In response to the public hearing requests, the Board held a meeting with the individuals who had requested a public hearing, as well as representatives of the Minnesota Association of Soil and Water Conservation Districts, to address the issues raised during the public comment period.[6] As a result of this meeting, changes were made to the proposed rules, and 21 of the 41 requests for public hearing were withdrawn and no hearing was required.[7]

On October 16, 2012, the Board sent an email notification to all individuals who requested a hearing.[8] The email notified the recipients that 21 of the 41 requests for hearing had been withdrawn, the reason for the withdrawal of those requests, and a description of the changes that were made to the proposed rules which resulted in the withdrawal of requests for hearing.[9] The notice of withdrawal, by implication, but not directly, advised the recipients that no public hearing would occur.[10]

The notice, however, failed to advise the recipients of their right to submit written comment relating to the withdrawal within five (5) working days. Instead, the notice provided, "Please review these documents and contact me if you have any questions or would like to discuss them further."[11] As a result, the notice of withdrawal was deficient and failed to allow those who had not withdrawn their request for hearing of their right to be heard.

To correct this defect, the Board may, during the resubmission period, re-notice all those individuals who submitted a request for hearing advising them of their right to further comment. The notice should be similar in content to the October 16, 2012, email, but should specifically include the right to submit written comment within five (5)

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[5] Ex. D at 5; Ex. J.
[6] *Id.*
[7] *Id.*
[8] Ex. K.
[9] *Id.*
[10] *Id.*
[11] *Id.*

working days. By taking this corrective action to cure the error, the Board can ensure that it did not deprive any person or entity of an opportunity to meaningfully participate in the rulemaking process.

II. SUBSTANTIVE DEFECTS

A. Proposed Rule 8400.0900, Subpart 2.

In its original form, Rule 8400.0900, subp. 2 provided a maximum cost-share rate of 75% and set forth specific factors that the Board must evaluate in establishing the cost-share rate under the Erosion Control and Water Management Program. Under the proposed revised Rule 8400.0900, subp. 2, the Board removes the maximum cost-share percentage and deletes the factors that the Board shall consider when establishing cost-share rates. In lieu of those provisions, the Board proposes to establish as yet unspecified internal policies to determine the maximum cost-share rate, as well as the factors used to determine that rate.

According to the SONAR submitted by the Board:

> A portion of this subpart is deleted which portion will be addressed in the required program policy. The current rate of 75 percent is not in statute, and flexibility that is possible through policy will increase the ability to coordinate funding for important conservation practices with other state and federal programs. Other factors discussed in this subpart are either obsolete or are not elements of future program implementation.

Thus, by deleting from the rule the maximum cost-share rate and the factors used to determine that rate, the Board seeks to have more "flexibility" in determining the rates. Clearly, agency policies are more flexible and more easily changed than administrative rules. However, by removing the maximum rate and the rate-making factors from the rule, the Board evades the public rulemaking requirements of Minn. Stat. Chap. 14 and Minn. R. Parts 1400.2000 - 2410.

Because Minnesota Statutes do not prescribe a 75% maximum cost-share for the subject programs, the Board is within its legal authority to delete that percentage from the rules. The public was advised of that deletion and has had the opportunity to comment on that change. Accordingly, such a deletion is permissible.

The same is not true for the elimination of the cost-share rate factors. Replacement of cost-share rate determination factors with internal Board policies exceeds the Board's legal authority.

A "rule" is defined by Minn. Stat. § 14.02, subd. 4 as:

> [E]very agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced and administered by that agency or to govern its organization or procedure.

All agency "rules" are subject to the rulemaking process provided in Minn. Stat. Chap. 14 and Minnesota Rules Parts 1400.2000-2410.

The cost-share rate determination factors are "statements of general applicability and future effect…adopted to implement or make specific" the programs administered by the Board. They are generally-applied factors that directly affect the rights of, or procedures available to, the public. As such, the factors do not fall within the rulemaking exceptions provided for in Minn. Stat. § 14.03, subd. 3, and may not be replaced by internal Board policies exempt from the public rulemaking process.

By removing the generally-applicable cost-share rate determination factors from its administrative rules and replacing them with internal board policies that can be changed by the Board without notice or limitation, the Board is exceeding its statutory authority. To correct this defect, the Board can reinsert the existing cost-share rate factors into the rule (which would not require reinstituting the rulemaking process) or it can modify those factors so long as its methods and approaches are sufficiently detailed to describe its decision-making process. Either way, if the Board intends to have specific factors to guide it in determining cost-share rates, it must include those factors in official rules, not internal policy.

B. Proposed Rule 8400.3730, Subpart 1

Rule 8400.3730, subp. 1 relates to conservation easements. In its original form, the rule provides that, "The encumbrance must comply with the limits in Minnesota Statutes, section 103F.515, subdivision 6, paragraph (a), clauses (1) and (2)." The proposed revised rule replaces the statutory reference with: "The encumbrance must comply with the limits prescribed by the state board."

As with the cost-share rate determination factors, if the Board is intending to institute limits applicable to the conservation easement program or the cost-sharing funds to be encumbered, it must specify those limits for the public in advance. It is not sufficient that the Board leave these limits to yet-to-be-determined Board policies. Such limits are of general applicability and future effect, rendering them within the statutory definition of a "rule." Accordingly, the limitation must be prescribed by rule or other statutory direction readily available to the public, not internal policies changeable at will and without notice by the agency. To correct this defect, the Board can insert the applicable statutory reference or revise the rule to expressly state the applicable limitations.

C. Proposed Rule 8400.3030, Subpart 17b

Proposed Rule 8400.3030, subp. 17b defines the "Easement program practice specifications" to mean "the detailed descriptions of the approved practices that are allowed on lands enrolled in the conservation easement programs." The Proposed Rule removes, however, the reference as to where those practice specifications can be found. By removing the reference to the specific Board policy, the Board is removing the easement program specifications from the rule and generally referring to yet-to-be-

determined agency policy not subject to the rulemaking process. To correct this defect, the Board can simply provide where those specifications can be found.

D. Proposed Rule 8400.0100, Subparts 3 and 8

Rule 8400.0100, subp. 3 and 8 provide definitions for "Annual Work Plan" and "Comprehensive Plan." In the proposed rules, the two definitions refer to "the most recent policy published by the state board" without stating to which policy the Board is referring. In its original form, the definitions referred to the most recent version of the Guidelines for Soil and Water Conservation District Comprehensive and Annual Plans. By removing the specific policy reference, and replacing it with a vague and general reference to "recent policy published by the state board," the definitions are rendered ambiguous. Accordingly, to correct this defect, the Board must specify the policy to which it is referring.

E. Proposed Rule 8400.3000

Proposed Rule 8400.3000 relates to the Board's authority to implement a program to acquire easements on land. The first portion of the proposed rule reads:

> Minnesota Statutes, sections 84.95, 103A.209, and 103F.501 to 103F.531, authorize the state board, in consultation with districts, private groups, and state and federal agencies, to implement a program to acquire easements on land to retire certain marginal agricultural land and protect environmentally sensitive areas to enhance soil and water quality, minimize damage to flood-prone areas, sequester carbon, and support native plant, fish, and wildlife habitats and to reestablish perennial cover and restore wetlands on that land….

As a technical issue, it appears that there may be two commas or semicolons missing from the description of the Board's authority, which would make the description clearer and separate out each of the purposes of the programs. The suggested placement of the semicolons is as follows:

> Minnesota Statutes, sections 84.95, 103A.209, and 103F.501 to 103F.531, authorize the state board, in consultation with districts, private groups, and state and federal agencies, to implement a program to acquire easements on land[;] to retire certain marginal agricultural land[;] and [to] protect environmentally sensitive areas to enhance soil and water quality, minimize damage to flood-prone areas, sequester carbon, and support native plant, fish, and wildlife habitats and to reestablish perennial cover and restore wetlands on that land….

The suggested change is simply to bring clarity and not change the content of the proposed rule. This is not a defect in the proposed rule and does not affect its legality. Thus, adoption of this change is not a requirement for approval.

However, the last sentence of the proposed rule does present a legal defect. The Proposed Rule 8400.3000 contains the following sentence:

> The state board shall implement the reinvest in Minnesota reserve program with district boards when practical, but may also implement the program directly or through its authorized agents.

The words, “when practical” infuse vagueness and ambiguity into the scope of authority. “When practical” is not sufficiently precise to explain when the program will and will not be implemented with district boards. Essentially, the rule states that the program can be implemented by the state board or its undefined “authorized agents,” but the state board may also, when convenient, include the district boards. The sentence is not sufficiently precise, and the first mandatory clause appears to conflict with the second discretionary clause. To state a proper rule, the Board must state with some particularity when it will implement the reserve program through the district boards.

Once these procedural and substantive defects are corrected, the Board may resubmit the rules to the Chief Administrative Law Judge for review and approval.

A.C.O.